

**Commonwealth of Kentucky
Workers' Compensation Board**

OPINION ENTERED: June 8, 2018

CLAIM NO. 201700136 & 201695061

NICHOLAS BASS

PETITIONER

VS.

**APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE**

ZENITH LOGISTICS AND
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

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BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

ALVEY, Chairman. Nicholas Bass ("Bass") appeals from the December 27, 2017 Opinion, Order, and Award rendered by Hon. Grant S. Roark, Administrative Law Judge (ALJ"). The ALJ awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") and medical benefits for a work-related low back injury, but dismissed Bass' claim for

a cervical condition allegedly caused by cumulative trauma. Bass also appeals from the February 26, 2018 order denying his petition for reconsideration.

On appeal, Bass argues the ALJ misinterpreted the evidence. He argues that when viewed in its entirety, the evidence compels a finding his cervical condition is work-related. We disagree and affirm.

Bass filed two Form 101s alleging separate injuries. Bass alleged he sustained a cumulative trauma injury to his cervical spine due to repetitive motion and heavy lifting while working as an order selector for Zenith Logistics ("Zenith"). Bass identified September 4, 2015 as the date of injury. Bass also alleged he sustained a specific low back injury on January 6, 2016, while lifting a box. Zenith denied the cervical claim, but accepted the low back claim as compensable. Zenith additionally filed multiple medical fee disputes. Because the issue on appeal only involves the cervical claim, we will not discuss in detail the evidence related to the low back injury.

Bass testified by deposition on July 14, 2017, and at the hearing held October 24, 2017. Bass began working as an order selector for Zenith in July 2010. Bass' job entailed pulling products and assembling them into boxes for delivery to Kroger. Bass was required to repetitively lift forty to

eighty pounds on a daily basis, and sometimes more during the busy season. He used his hands and neck to reach and lift product from top shelves and load boxes onto a trailer. Bass testified he worked seven days a week, ten hours a day in 2015. Bass denied any injuries or treatment to his neck or low back before he was employed by Zenith. He was also required by Zenith to pull a certain amount of product in a specific timeframe, for example five hundred cases in sixty minutes. Bass began experiencing symptoms in his neck and upper back, as well as his low back. He sought treatment at American Chiropractic, and continued to perform his regular job.

Bass testified that on January 1, 2016, he felt a pop in his low back while lifting a box. Bass initially treated at Occupational Kinetics, which provided no relief. Bass eventually treated with Dr. John Cole, who performed surgery to his low back on March 2, 2016. Dr. Cole released Bass to return to work on August 31, 2016. Bass attempted to return to work for one day on September 4, 2016, but was unsuccessful due to a worsening of his neck and low back symptoms. Bass testified the low back surgery provided little relief, and he was dissatisfied with Dr. Cole's treatment. Dr. Cole did not render any treatment for his neck and upper back symptoms.

Bass treated with Dr. Cole primarily for his low back condition from February 2016 through October 2016. Dr. Cole released Bass to full duty and found he had attained maximum medical improvement ("MMI") from his low back surgery on August 31, 2016. Bass subsequently complained of bilateral leg symptoms. Dr. Cole ordered a repeat lumbar MRI, as well as a thoracic MRI. On October 7, 2016, Dr. Cole noted Bass continued to complain of left leg symptoms, and a recent onset of occasional tingling in his arms. Dr. Cole noted the thoracic MRI demonstrated mild overall degenerative disc disease without significant cord contouring or signal change. Dr. Cole released Bass from his care since he was not clinically myelopathic and the cause of his new complaints could not be determined.

Bass sought treatment on his own with Dr. David Rouben who ordered a cervical MRI and performed surgery on September 11, 2017. He also prescribed Gabapentin and referred Bass to pain management for his low back. Bass continues to follow up with Dr. Rouben for his cervical complaints, and he treats with Norton Pain Management for his low back.

Bass began treating with Dr. Rouben and his physician's assistant on December 12, 2016. He complained of neck and thoracic pain, as well as paresthesia in all

extremities. Bass reported the January 6, 2016 low back injury. He also advised his neck and thoracic pain began after he attempted to return to work in September 2016. X-rays taken the same day demonstrated cervical spondylosis and no thoracic abnormalities.

On February 8, 2017, Dr. Rouben noted Bass lifted boxes and crates at work on a daily basis, and developed pain in his neck, head, upper scapular, and upper thoracic region over the past one or two years. Dr. Rouben noted the cervical MRI demonstrated significant disc protrusion at C4-5 and C5-6, as well as persistent protrusions at C3-4 and C6-7. Dr. Rouben diagnosed a cervical herniated disc, cervical stenosis of spinal canal, cervical radicular pain, cervical foraminal stenosis, lower extremity numbness, neck pain, work-related injury, status post lumbar laminectomy, and cervical spondylosis with myelopathy. Dr. Rouben ordered a lumbar MRI and EMG/NCV of the right upper extremity. Dr. Rouben's note stated Bass sustained a "work related injury at Kroger. Severe cervical spondylosis with direct cord compression. Upper and lower extremity symptomatology consistent with cord compression. Status post right laminotomy discectomy mid lumbar spine 1 year ago. Persistent symptoms of lower and upper extremity weakness and numbness." He recommend an ACDF

at C4-5 and C5-6, and possibly C3-4 and C6-7. According to Bass, Dr. Rouben performed this surgery on September 11, 2017.

Bass returned to work on light duty after the January 1, 2016 injury. This consisted of sitting in a chair for approximately one month. Thereafter, he did not return to any work other than the one day in September 2016. Bass was paid TTD benefits from January 31, 2016 to December 4, 2016.

Bass began treating at American Chiropractic on September 4, 2015 for complaints of low back and cervical pain. Bass reported his job required lifting boxes, and he worked three to four weeks without a day off. Bass received monthly chiropractic treatments from September 2015 to January 2016.

Bass filed the July 10, 2017 report of Dr. Jules Barefoot. Dr. Barefoot noted Bass reported his job involved shipping and packing boxes, and he was required to lift, carry, and handle boxes weighing sixty to ninety pounds on a regular basis. Dr. Barefoot noted the January 6, 2016 low back injury and treatment, as well as the development of severe cervical pain radiating into Bass' arms. Dr. Barefoot diagnosed Bass as status post L2-3 microdiscectomy on March 2, 2016; ongoing radicular symptoms in the lumbar spine; and multilevel cervical disc disease with non-verifiable

radicular complaints. Dr. Barefoot assessed a 13% impairment rating for Bass' lumbar spine pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He assigned restrictions, and found Bass attained MMI one year after the surgery. He opined Bass would have difficulty returning to his former job. Dr. Barefoot did not address causation or impairment of Bass' cervical condition.

Zenith filed the November 15, 2016 report of Dr. Russell Travis. He discussed Bass' low back condition, and noted, "he denies neck pain or any previous history of neck pain." Dr. Travis diagnosed discectomy at L2-3 for an extruded fragment on March 2, 2016. Dr. Travis found Bass had attained MMI and assessed a 10% impairment rating for the lumbar condition pursuant to the AMA Guides. Dr. Travis assigned lifting restrictions and noted Bass should not return to his former job.

Zenith also filed the July 25, 2017 report of Dr. Gregory Gleis. Bass reported his job required handling boxes weighing forty to eighty pounds, and he worked ten hours per day, seven days per week in September 2015. Bass reported he experienced constant neck and low back pain, and sought chiropractic treatment. Bass also reported the January 6, 2016 accident resulting in a March 2, 2016 L2-3 discectomy.

Dr. Gleis noted Bass reported the return low back and leg symptoms when he attempted to return to work in September 2016, as well as upper back, neck and bilateral upper extremity symptoms.

Dr. Gleis performed an examination and reviewed the medical records. He opined Bass' neck-related symptoms are due to the natural aging process. He specifically replied to the following questions:

3. Does Mr. Bass have any objective evidence of a harmful change due to cumulative trauma during his employment with the Defendant?

A. Neck and both upper extremities, right greater than left.

Based upon Mr. Bass' description, his work activities were not "repetitive" to a degree greater than expected for warehouse work.

12/16/17 MRI Cervical report Dr. Dubose, and MRI images were reviewed: Multiple levels at C3-4, C4-5, C5-6, C6-7 showed disc protrusions some of which efface the anterior cervical cord.

Because of the multiple disc levels involved, this is much more likely due to the "natural aging process" rather than to a "work-related" or traumatic injury.

Therefore, cervical complaints would be more likely related to "the natural aging process" rather than "cumulative trauma". . . .

If so, please explain, including your opinion as to whether the nature and

duration of the work performed by Mr. Bass during his employment with [Zenith], has aggravated and accelerated a degenerative condition to the degree that his problems have culminated in an active physical impairment sooner than had he been engaged in another form of employment.

A. Regarding cervical spine:

His work required activities should not have caused the diffuse cervical degenerative disc changes described in the 12/16/17 MRI Cervical.

His [Zenith] work activities should not have aggravated or accelerated the cervical degenerative changes more so than if he had been engaged in another form of less physical employment.

As reported in the two scientific articles by M. Battie, the genetic influences have been confirmed to be the dominant role in the disc degeneration explaining up to 74% variance."

Dr. Gleis assessed a 0% impairment rating for the cervical spine, did not assign any work-related restrictions, and opined Bass is able to return to his former job. Regarding the lumbar spine, Dr. Gleis found Bass attained MMI on September 23, 2016, assessed a 10% impairment rating pursuant to the AMA Guides, and agreed with the restrictions imposed by Dr. Travis. He opined no additional lumbar treatment was necessary, and he disagreed with the recommended cervical surgery. In a supplemental report dated

August 18, 2017, Dr. Gleis disagreed with many aspects of Dr. Barefoot's July 10, 2017 report.

A benefit review conference ("BRC") was held on October 24, 2017. The BRC Order and Memorandum indicates the parties stipulated Bass sustained a work-related injury on January 6, 2016, but Zenith disputed the alleged September 4, 2015 injury. Zenith paid TTD benefits from January 31, 2016 through December 4, 2016, as well as medical expenses for \$52,275.67. The parties identified the following contested issues: benefits per KRS 342.730, work-relatedness/causation (neck); notice (neck); unpaid or contested medical expenses, TTD, MMI (neck); manifestation date (neck); medical fee disputes; interest while Bass could not attend an independent medical evaluation.

The ALJ determined the lumbar injury was compensable and awarded PPD benefits based upon the 13% impairment rating. He also determined Bass does not retain the physical capacity to return to work. The ALJ made the following analysis in dismissing the cervical claim:

Having reviewed the evidence of record, the Administrative Law Judge ultimately is not persuaded plaintiff has carried his burden of proving a work-related cervical injury. In reaching this conclusion, it is noted that no physician of record has explained with any specificity which of plaintiff's job

duties, if any, could have led to symptomatic multilevel cervical degenerative disc disease. Conversely, Dr. Gleis pointed out that plaintiff's cervical degenerative disc disease represented entirely normal, age-related changes and that plaintiff demonstrated no at home out[sic] case which could be causally related to any work activities for the defendant. Based on Dr. Gleis' opinions, it is determined that plaintiff's alleged cervical condition is not work-related and, as such, it must be dismissed. The related issues of notice, MMI, and manifestation date with respect to plaintiff's cervical claim are all therefore rendered moot.

The ALJ determined Bass is not entitled to additional TTD benefits and resolved the pending medical disputes, with the exception of the challenged repeat lumbar MRI, in Bass' favor. The ALJ also determined Zenith remains responsible for interest on all past due benefits. Accordingly, the ALJ awarded TTD benefits as already paid, PPD benefits and medical benefits for the lumbar injury only.

Bass filed a petition for reconsideration arguing the ALJ misinterpreted the evidence when he found no physician of record explained with any specificity which of his job duties could have led to symptomatic multilevel cervical disc disease. Bass points to the records of Dr. Rouben and American Chiropractic, and argued his treating physicians related the cervical condition to his work activities with

Zenith. The ALJ denied the petition as a re-argument of the merits in an order dated February 26, 2018.

On appeal, Bass argues the ALJ misinterpreted the evidence which, if viewed in its entirety, compels a finding his cervical condition is work-related. Bass points to his testimony regarding his work activities, and the fact he worked seventy hours a week in 2015. Bass also points to the American Chiropractic records and to Dr. Rouben's opinion the cervical condition is work-related.

As the claimant in a workers' compensation proceeding, Bass had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Bass was unsuccessful in his burden regarding his alleged cervical condition, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira

A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp an ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded

the evidence or by noting reasonable inferences could otherwise have been drawn from the record. Whittaker v. Rowland, supra. As long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, supra.

We find Bass' arguments on appeal are nothing more than a re-argument of the evidence before the ALJ. After careful review, we find the ALJ accurately summarized the evidence and had a complete understanding of the issues before him. The ALJ clearly relied upon Dr. Gleis' opinion in determining the cervical condition is unrelated to his work activities with Zenith. On appeal, Bass does not challenge Dr. Gleis' opinion. After review of the July 25, 2017 report, we find Dr. Gleis' opinion alone constitutes substantial evidence supporting the ALJ's determination, and no contrary result is compelled. The ALJ also noted no physician of record has explained with any specificity which of plaintiff's job duties, if any, could have led to symptomatic multilevel cervical degenerative disc disease. While Bass is able to point to evidence which would support a finding of a work-related cervical condition, this does not compel a contrary result. The ALJ acted within his discretion in choosing to rely upon Dr. Gleis' report, and his determination will not be disturbed.

Therefore, the December 27, 2017 Opinion, Order, and Award, and the February 26, 2018 Order on petition for reconsideration rendered by Hon. Grant S. Roark, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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